

FINAL DRAFT

**BUSINESS MEETING
BOARD OF COAL MINING EXAMINERS**

Department of Mines, Minerals and Energy
Buchanan-Smith Building, Big Stone Gap, Virginia
Thursday, June 21, 2007 – 10:00 A.M.

MINUTES**BUSINESS MEETING
BOARD OF COAL MINING EXAMINERS****Members Present**

Joe Buchanan
Gerald Kendrick
Frank Linkous
Arvil McConnell
Ricky O'Quinn

Others Present

Mary Gibson, Regulatory Boards Administrator
Donna McFaddin, Administrative Program Specialist
Sharon Pigeon, Assistant Attorney General
Benny Wampler, DMME Deputy Director

Meeting Called To Order

Chairman Frank Linkous called the meeting to order at 10:00 a.m. All members of the Board of Coal Mining Examiners (BCME) were present and acknowledged their new member, Ricky O'Quinn.

Focus of Meeting

The focus of the meeting was to review provisions of Senate Bill 1091 that was approved April 4, 2007, effective July 1, 2007, as well as the implications for the Board that will administer the law changes that specifically deal with substance abuse. A motion was made, seconded with unanimous vote taken, to approve the agenda for the June 21, 2007, meeting.

Minutes for May 1, 2007, Meeting

No additions or corrections. A motion was made, seconded with unanimous vote taken, to accept the minutes from the May 1, 2007, meeting.

Senate Bill 1091

- §§ 45.1-161.32 & 45.1-161.32 The Code has been amended to allow the Board to raise fees for certifications and replacement certificates. (This topic will be discussed in detail later in the meeting.)
- § 45.1-161.35.B. The Code has been changed in the language under the sections that relate to the Board and the Board's authority to include the words "*suspend*" or "*take other action regarding*" in addition to "revoke". This change codifies the current Board practice of using the power of suspension as opposed to just revoking certifications.
- § 45.1-161.35.C. "*Any person holding a certification issued by the Board shall report to the Chief, within 30 days of any criminal conviction in any court of competent jurisdiction for possession or use of any controlled substance without the prescription of a licensed prescriber. This conviction shall result in the immediate temporary suspension of all certificates held by such person pending hearing before the Board.*"

In essence, if an individual is convicted for possession or use of any controlled substance without the prescription of a licensed prescriber, it is incumbent upon him/her to notify the Board of that conviction within 30 days. The Board has procedures in place for accomplishing that notification, and they are currently being communicated to all potentially

affected by this change. While there may be a problem with convicted individuals complying with this requirement, the Board has ways of dealing with this other than relying solely on reporting by the individual. Procedures are being established for going online through the Clerks' Offices for both the General District and Circuit Courts to obtain information on local convictions. Monitoring convictions in Kentucky and West Virginia requires more research, at this time.

- § 45.1-161.35 .D. *“Any miner present at any mine shall be deemed to have given consent to reasonable search, at the direction of the Chief by employees of the Department, of his person and his personal property located at the mine. This search shall be limited to the investigation of potential violations of the Coal Mine Safety Act.”*
- § 45.1-161.35. E. *“All information regarding substance abuse test results of certified persons, written or otherwise received by the Department or Board, shall be confidential. Any hearing of the Board in which this information is presented shall be conducted as a closed session in accordance with the Virginia Freedom of Information Act (§§ 2.2-3700 et seq.).*
- § 45.1-161.35.H. *“Any hearing conducted after the temporary suspension of a miner’s certificate due to (i) a criminal conviction in any court of competent jurisdiction for possession or use of any controlled substance without the prescription of a licensed prescriber as provided for in subsection C, (ii) a failure to pass a substance abuse test required by the Chief pursuant to Sec 45.1-161.78, (iii) a failure to pass a pre-employment substance abuse screening test, (iv) a discharge for violation of the company’s substance or alcohol abuse policies, (v) a positive test for the use of any controlled substance without the prescription of a licensed prescriber, (vi) a positive test for intoxication while on duty status, or (vii) a failure to complete a substance abuse program pursuant to Sec 45.1-161.87, shall be conducted within 60 days of the temporary suspension. The Board shall make every effort to hold the hearing within 40 days of the temporary suspension.”*

Procedures have been established under which the certifications of those who are identified as having violated a substance abuse policy will be placed in immediate suspension, with the right to promptly appeal to this Board for review and reconsideration of the issue.

- § 45.1-161.35.I. *“Any person who has been aggrieved by a decision of the Board shall be entitled to judicial review of such decision. Appeals from such decisions shall be in accordance with Article 5 (§§ 2.2-4025 et seq.)*
- § 45.1-161.37. Under the General Coal Miner Certification provisions enacted in 1996, it was optional for experienced miners to choose to be grandfathered into the program and receive certification. If a miner elected not to be certified, that was their choice. After 1996, every miner working on the surface or underground at a coal mine operation has been required to hold a General Coal Miner Certification. In order to facilitate the enforcement of the substance abuse changes in the Bill, it is now necessary to have everyone hold a General Coal Miner Certification. This new requirement provides that all miners, including grandfathered miners, must obtain the General Coal Miner Certification by September 30, 2007.

- § 45.1-161.39. This section enumerates amended requirements for obtaining a Surface Foreman Certification. The Board previously discussed the need to have surface foreman criteria set that were comparable to those applicable to underground foremen, as far as experience requirements. Previously, the wording required five years of surface coal mine experience. The Code was amended to allow for other relevant experience to be considered that included education and other mining experience. Additionally, surface foremen must now have at least three years of experience in a surface coal mine.
- § 45.1-161.78.D. *“The Chief shall require substance abuse testing as part of an inspection or complaint investigation if there is reasonable cause to suspect a miner’s impairment, due to the presence of intoxicants or any controlled substance not used in accordance with the prescription of a licensed prescriber, or has been a contributing factor to any accident in which a serious personal injury or death occurs at a mine. The Chief shall require substance abuse testing of any miner killed or seriously injured and of any other person who may have contributed to the accident. Any substance abuse testing required by the Chief will be paid for by the Department. Refusal by any miner to submit to substance abuse testing, or the failure to pass such a test, shall result in the immediate temporary suspension of all certificates, pending hearing before the Board of Coal Mining Examiners.”*

This statute gives the Board the power to suspend individuals based on the results of Department-mandated testing. Such testing will be required if there is reasonable cause to believe a miner is impaired as identified through inspections, through investigation of complaints, or through accidents and serious injuries that occur.

- § 45.1-161.87.D. *“The mine operator shall implement a substance abuse screening policy and program for all miners that shall, at a minimum, include a pre-employment, 11-panel urine test for the following substances:*

1. Amphetamines	5. Phencyclidine (PCP)	9. Methadone
2. Cannabinoids/THC	6. Benzodiazepines	10. Barbiturates
3. Cocaine	7. Propoxyphene	11. Synthetic Narcotics”
4. Opiates	8. Methaqualone	

There are several different panels, including the DOT 5-panel screening, which is very different from the 11-panel test. The 11-panel screening catches most of the major areas of concern in terms of depressants, legal and illegal drugs. At this time, the 11-panel screening is not routinely done in the industry, but it will give a good comprehensive evaluation for pre-employment.

Samples shall be collected by providers who are certified as complying with standards and procedures set out in the U.S. Department of Transportation regulation at 49 CFR Part 40. Collected samples shall be tested by laboratories certified by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing. SAMHSA is the national accredited sampling entity in our nation. There are currently two major companies that administer testing pursuant to SAMHSA protocols, one in Charlotte and one in Utah.

- § 45.1-161.87.E. *“The operator or his agent shall notify the Chief, on a form prescribed by the Chief, within 7 days, of any failure of a pre-employment substance abuse screening test. Notice shall result in the immediate temporary suspension of all certificates held by the applicant, pending hearing before the Board of Coal Mining Examiners.”*

Notification to the Board is mandated, and immediate temporary suspension will result upon confirmation of a positive test result or a violation of a substance abuse policy and program. The remedy is to appeal by appearance before this Board if the miner challenges the suspension.

- § 45.1-161.87.F. *“The operator or his agent shall notify the Chief, on a form prescribed by the Chief, within seven days of (i) discharging a miner due to a violation of the company’s substance or alcohol abuse policies, (ii) a miner testing positive for intoxication while on duty status, or (iii) a miner testing positive as using any controlled substance without the prescription of a licensed prescriber. An operator having a substance abuse program shall not be required to notify the Chief under subdivision (iii) unless the miner having tested positive fails to complete the operator’s substance abuse program. Notice shall result in the immediate temporary suspension of all certificates held by the applicant, pending hearing before the Board of Coal Mining Examiners.”*

Many miners hold only General Coal Miner Certification or Gas Testing Certification, but there are others that hold eight or more certifications. These individuals would be losing their right to exercise any of those certification privileges in the coal industry until they address this issue before the Board.

- § 45.1-161.87.G. *“The provisions of this chapter shall not be construed to preclude an employer from developing or maintaining a drug and alcohol abuse policy, testing program, or substance program that exceeds the minimum requirements set forth in this section.”*

The mine operator has the ability to craft the substance abuse policy and program for his mine that meets these minimum requirements and other standards suitable for his operation and the Drug-Free Workplace National directive.

Frank Linkous reported on the Department of Mines, Minerals and Energy’s (DMME) efforts to implement this new law. Although the agency hasn’t had much advance time for implementation, it has moved forward quickly to prepare and equip personnel for assisting operators in understanding the new law and the new reporting process. By June 29th, DMME’s goal is that all mine sites will have received this information. Division of Mines’ (DM) intention is to put as complete information as possible together at this time directly into the hands of every coal miner.

DM has tried to address some of the questions up front. Since then, DM has received many more questions, some of which have now been consolidated. Packets of information were given to the Board members, and will be available on the DMME and DM web sites. DM will also be preparing an Operators Bulletin to be released this week. Mike Abbott, DMME Public Relations Officer, will be issuing a general press release. Carroll Green has been appointed coordinator of the DM Substance Abuse Program.

DM personnel will be scheduling meetings with the medical community and physicians to alert them to the new program and how it will affect them, including: agency concerns over prescribing of controlled substances that are used in the work place; the emphasis that the Board and DMME are going to place on policies and programs requiring that such usage must be disclosed to the operator; that it must be understood and verified that individuals are using the drugs legally and as prescribed; and of the medical community's responsibility to advise their patients of the seriousness of exceeding safe dosages and how it can affect the individual's job performance.

A meeting will also be scheduled with the Wise County Sheriff's Office and the Drug Task Force to inform them of the new law and DMME's efforts and gain their input.

Examination Fees

Mary Gibson distributed a "Certification Fee Structure". This chart provided cost comparisons for Kentucky, West Virginia, and Virginia. There is a maximum fee of \$50 that cannot be exceeded in Virginia. Virginia is currently charging a fee of \$10.00 for all certifications and a \$1 fee for replacement cards. The initial proposal set before the Board was \$35 for all certifications except for General Miner, which would be \$15; and the replacement card fee would increase from \$1 to \$5.

DM has a high percentage of no-shows for the scheduled exams. With the increase in fees, the desired effect is that the greater financial cost will be taken more seriously and exam attendance will be higher. The bulk paperwork for exams and postage is costly. The increase in fees will help cover this expense, as well.

Sharon Pigeon advised that there could be some significant legal ramifications from this new consent to search substance abuse, and opined there could be a market for the replacement cards. Frank Linkous reported that DM inspectors could confirm certifications on their laptop computers. The inspectors work at a mine on an average of two years, which allows them to know the people. When a new person starts, the inspector confirms the certification not based on the card but against DM files. Also, DM relies on the employer to pre-screen employees for proper documentation.

The question on the table was "should we go more than \$5 for a replacement card?" Sharon recommended such to deter fraudulent use of these cards. Thereafter, a motion was made **to increase all Virginia mining certifications to \$40, with the exception of the General Coal Miner Certification, which would be increased to \$20, and the Replacement of Cards increased to \$10**, seconded, with unanimous vote taken. A motion was made for the implementation date for the fee increase to be **effective July 1, 2007**, seconded, with unanimous vote in approval.

OPEN AGENDA

Administrative Board Activities

Sharon Pigeon recommended the Board to consider meeting on a monthly basis, at least initially, when this new procedure starts. The Board will have an obligation to those holding certifications potentially affected to have a hearing as quickly as possible and resolve the matter.

She recommended choosing a specific date, such as the second Tuesday of each month, and noted that the fee increases could help defray the additional costs on the Board to meet its anticipated more frequent hearing demands.

Frank Linkous distributed emailed examples of the State of Kentucky substance abuse rulings affecting certifications. DM has attempted to maintain ongoing communications with Kentucky as they have implemented that state's version of this bill. E-mails set out the actions taken – Permanent Revocations of Certificates, Drug Policy Suspensions. As DM receives this information, the names are cross-referenced to see if they hold certifications in Virginia. During the last review, 30+ individuals were found that also held certifications in Virginia. When this is discovered, the individual is sent a letter advising them that they are temporarily suspended until they come before the Board.

Attendance by the Board at their Kentucky counterparts' meeting in Frankfort on July 12th is tentatively scheduled. As this is approximately a five-hour drive, the Chairman recommended leaving the night before and traveling together in a van. DM will cover the costs of the lodging and the Board would be entitled to a \$50 per diem for any called meeting, as well as expenses. Board members need to complete the necessary forms. Further information and forms will be provided at a later date.

Sharon Pigeon distributed handouts on "Access to Public Meetings under the Virginia Freedom of Information Act" and "E-Mails and Meeting under the Virginia Freedom of Information Act" (FOIA), reference materials obtained at a recent FOIA conference.

A discussion ensued concerning, "What does a public body have to do to close a meeting?" Although it is not a requirement to poll the members and list the names, if dealing with a sensitive matter, it is a recommended procedure. The motion to go to closed session must be made in the public meeting while everyone is still together, and the subject matter has to be identified for the closed meeting. It is necessary to state the purpose of the closed meeting and then make specific reference to the applicable exemption from the open meeting requirements. In a closed session, the Board can only discuss what they identified for closed session consideration in the motion during open session, nothing else. The motion **must** be set forth in detail in the minutes for the open meeting itself.

A general reference to the provisions of FOIA, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting. Sharon recommended that the Board use both the statutory reference under the Mine Act, as well as the FOIA exemption reference. Sharon will prepare a form motion for the Board to use for closed sessions.

There does not have to be a verbatim transcript of the closed session. A general synopsis of what is discussed will suffice. **The synopsis must be written and it is confidential.** Open Board meetings require verbatim transcripts. If the synopsis is pertaining to one case, it was recommended that a copy be placed in that individual's file. The synopsis would provide the documentation supporting the action taken.

One of the exceptions that allow closed meetings is to discuss probable litigation. Although the Board or others had thought in the past that simply engaging in talks with legal counsel was sufficient to go into a closed meeting, this is not the case. Probable litigation means that you have specific information and a lawsuit has been filed or is potentially pending

Only non-public business matters, lawfully exempted, can be discussed. When coming back on record, a statement must be made into the record of exactly what happened. Take a role call or other recorded vote certifying that to the best of each member's knowledge:

1. Only non-public business matters lawfully exempted from open meeting requirements under this chapter were discussed, and
2. Only such non-public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed, or considered in the meeting by the public body.

The vote must be included in the minutes of the open meeting.

Any member of the public body, who believes that there was a departure from the requirements of (1) or (2) above must state so prior to the vote, and indicate the substance of the departure that, in his/her judgment, has taken place. This statement must also be recorded in the minutes of the open meeting. Decisions become official actions when the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation or motion agreed to in the closed meeting. Also, a closed meeting can take place only within the context of an open meeting, even if the closed meeting is the only agenda item. In regards to the record of a closed session, if an individual files litigation against the Board members, *the Board members are protected by the State's sovereign immunity protection if they are doing everything reasonably required*

Further discussion ensued about considerations of potential disciplinary action of a certified miner under the mandate of the new Bill, as reasonably and necessarily including personal and medical information not otherwise related to public business. A lot of the information to be considered will be based on medical information, including drug tests results. Personal and medical information receive the highest protection under privacy acts. Some of the defenses offered by certification holders may relate to medical information. Personal and medical information not related to public business is covered under the exclusionary language in it under the general FOIA statute and more specifically than in the Miner Act. The two statutory references recommended at this time to control what the Board will be doing when going into closed session are: Va. Code § 2.2-3711.A.4, which is the general FOIA personal information not related to public business exemption; and Va. Code § 45.1-161.35.E, which is the confidentiality mandate under the Bill.

At the end of a closed session, the public body has to reconvene. The Board is required to return to the public body session.

Confidentiality Measures

DM will provide a vaulted-type security cabinet for the appeal files. The individual's file would be taken out of the DM general files and placed in the secure locked file.

Additional Questions Discussed

1. *What about requesting support for the defendant's case, such as affidavits?*

Affidavits are not recommended. People should bring witnesses. The witness can come into the closed session, give their testimony, and go back out. That would not compromise the closed session.

2. *Just on verbal testimony, if you've had a positive test result, do you think that's sufficient justification to say all is forgiven?*

No, but it is still relevant that you would hear the verbal testimony because that might determine the degree of punishment.

3. *What if an operator dismisses an employee based on a Quick Screen?*

The Board will require more than a "Quick Screen" test. The Board will require a confirmation of that sample by a full medical review process. Reliability of the sample on which the action was based is what the Board needs to assess in the hearing. The operator needs to show the results, the contract they have, who took the sample, etc. The Board may have to subpoena company personnel if they do not voluntarily agree to attend.

4. *What are the time limits on screen results?*

24 to 48 hours on a clean confirmation. If it goes beyond that, it can be 5 to 7 days before you get a confirmation on a positive.

5. *If the Board is enforcing the language of the regulation now, are they looking at when the operator first suspended the individual or when he actually has the results?*

When official notification is in hand.

6. *If someone comes before the Board, and we accept their witnesses and testimony, what happens next?*

Probation, agreement to random testing, and acceptance of costs for random testing can be considered. In regards to the number of tests, a range should be set (5 and 7 times within a certain period of time). The agency will need to be able to say that they acted at the direction of the Board.

7. *The inspectors are having anxiety about having personal contact, how is the agency going to handle that?*

No one DM employee will transport an individual who they encounter and have reasonable cause to believe to be impaired. DM would like for the operator to participate in transporting them, but if they don't, other DM personnel will accompany the inspector. Alternatively, if DM personnel need a second person, they contact their supervisor. DM inspectors cannot allow an individual to go on his own initiative to be tested.

8. *Are qualified people going to be available at the testing facilities to perform the test?*

We have identified the approved locations through NTA, and they have given the assigned facilities instructions, an information packet, and a special 11-panel identifying form. Those sites are supposed to be prepared to handle incoming drug screening at any time.

9. *The operator notifies the agency of a positive result. The Board has a form that the operator must complete. Can we ask the operator to submit a copy of that drug screen?*

The law doesn't provide for that. If needed, drug screen results can be subpoenaed for the appeal. After the hearing, if the Board revokes someone's certifications, they still have a remedy – they can go to court. At that point, the Board members could be subpoenaed.

The Board's ultimate goal is to confront the situation and work with our mining industry. Even if a miner is guilty, the Board hopes to give them the opportunity to clean up. By implementing the program, they hope all the miners will understand that it is a serious charge when you come before this Board. If the Board's actions don't demonstrate that this is a serious charge, the individual miners will not treat it seriously.

Frank Linkous thanked everyone for coming and adjourned the meeting at 1:50 p.m.

Respectfully submitted,

Donna McFaddin
Recorder